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IN THE SUPREME COURT OF THE STATE OF TENNESSEE

DAVIDSON EQUITY.

STATE EX REL. McCANLESS, ETC., ET AL.,
Appellee-Appellant,

vs.

STANDARD OIL COMPANY OF LOUISIANA,
Appellant-Appellee.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rule 12 of the Revised Rules of the Supreme Court of the United States (1941), Standard Oil Company of Louisiana, the above named appellant-appellee, files this its separate statement particularly disclosing the basis upon which it is contending that the Supreme Court of the United States has jurisdiction upon appeal to review the decree appealed from herein:

I.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction is Section 237(a) of the Judicial Code (28 U. S. C., Sec. 344(a)), as amended.

The case is one in which, under the legislation in force when the Act of Congress of January 31, 1928 was passed,

a review could be had in the Supreme Court of the United States on writ of error, for which remedy an appeal has been substituted by the Act of Congress of January 31, 1928 (Chapter 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (Chapter 440, 45 Stat. 466).

II.

Statute of State, Validity of Which is Involved.

The statutes of the State of Tennessee, the validity of which are involved, are the so-called inspection fee laws of Tennessee, compiled in Sections 6809, *et seq.*, of the Tennessee Code of 1932, the Sections which are directly involved herein being the following:

"6817. *Inspection before sale.*—All benzol, gasoline, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha and/or any other volatile substances, reflecting a gravity of sixteen degrees or above on the Baume scale, produced from petroleum, natural gas, oil shales or coal, by whatever trade name known and/or substitutes therefor, sold or used and/or stored in this state, separately or in combination for any purpose whatever, by any user and/or storer, including all subordinate governmental bodies, whether manufactured in this state or not, shall be inspected, under the general supervision of the inspector at large, before being sold or offered for sale or used and/or stored in this state. (1917, ch. 33; 1929, ch. 12, Modified.)"

"6818. *Inspection by coal oil inspectors.*—It shall be the duty of the inspectors to examine and test, within this state, all such volatile substances before being sold or offered for sale or used and/or stored in this state. (Ib., Modified.)"

"6821. *Fees of inspectors.*—Each inspector who shall inspect any consignment of volatile substances described in the preceding sections, as provided in this article, shall charge the consignor or consignee thereof

the sum of twenty cents for testing a barrel, or less quantity, and twenty cents additional for each barrel. Fifty gallons shall constitute a barrel. When the inspection is made of a tank containing more than fifty gallons, twenty cents shall be charged for each fifty gallons or fraction over. (Ib., Modified.)"

III.

Dates of Decree and Application for Appeal.

The first decree of the Supreme Court of Tennessee, the highest court of that State in which a decision in the suit could be had, was rendered and filed March 8, 1941. Thereafter, a petition for rehearing on behalf of Standard Oil Company of Louisiana was filed under the rules of the court, was entertained and was denied on May 17, 1941. A second petition for rehearing on behalf of Standard Oil Company of Louisiana was filed and was entertained by the court, but was denied June 28, 1941.

The decree of the Supreme Court of Tennessee did not become final, therefore, until June 28, 1941.

Citizens Bank v. *Opperman* (1919), 249 U. S. 448, 450; *Gypsy Oil Co.* v. *Escoe* (1927), 275 U. S. 498.

The date upon which the application for appeal herein is presented is July 28, 1941.

IV.

Nature of the Case and Rulings of the Courts Bringing the Case Within the Jurisdictional Provisions Relied Upon by Appellant.

This suit was instituted against petitioner, Standard Oil Company of Louisiana (hereinafter sometimes referred to as "defendant") by the State of Tennessee, on the relation of the Commissioner of Finance and Taxation and the Attorney General (hereinafter sometimes referred to as the

"State"), in the Chancery Court for Davidson County, Tennessee, on December 8, 1939. The object of the suit was to recover, under the inspection fee laws of Tennessee (Sections 6809, *et seq.*, Code of Tennessee), "inspection fees" at the rate of four-tenths of a cent per gallon on all petroleum products alleged to have been "imported into and/or stored in" Tennessee by petitioner, Standard Oil Company of Louisiana, during the three-year period commencing October 1, 1936, and ending September 30, 1939.

The bill of complaint set forth the amount claimed on each of three kinds of petroleum products, to-wit, gasoline, tractor fuel and kerosene (R. 3), but there were certain minor mistakes in the figures which were explained in the answer (R. 8-9) and it was stipulated that the figures contained in the answer were correct (R. 165). As corrected by said stipulation and by another stipulation (R. 201), the State's claim was for $94,727.46 on 23,681,864 gallons of high-test gasoline referred to as Esso, $135,503.24 on 33,875,811 gallons of regular gasoline referred to as Essolene, $46,496.95 on 11,624,237 gallons of tractor fuel, and $40,638.41 on 10,159,603 gallons of kerosene.

It was stipulated that none of the products in question were sold, used or distributed in Tennessee, but were all brought by defendant in barges from its refinery at Baton Rouge, Louisiana, up the Mississippi River to Memphis, Tennessee, and were there pumped from said barges into separate export tanks on the banks of the river, which tanks were each marked "For Export", and that all of said products were actually shipped to other States by tank car or barge within sixty (60) days after entering the separate export tanks (R. 174).

In its answer (R. 7-34) and amended answer (R. 193-195), which were duly filed in the Chancery Court, defendant denied all liability, raising both State questions and Federal questions. The defendant has consistently con-

tended from the beginning that the levy sought to be exacted on petroleum products brought into the State of Tennessee, temporarily stored for export and exported therefrom, was a matter of statutory construction, not authorized by the inspection fee laws of Tennessee and that, in any event, such inspection fee laws, if construed as applicable to the petroleum products involved in this cause, would be invalid as contravening both the commerce clause, Article I, Section 8, of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. The particular portions of the answer and amended answer which raised these Federal questions are found on pages 22-26, 30-34, 193-195, of the record.

The Chancellor, in the decree entered June 4, 1940, held that 1/25 of the so-called inspection fees represented the reasonable cost of inspecting the products involved, and that the remaining 24/25 constituted an attempted privilege tax.

He then held that the gasoline and tractor fuel (which is classed as gasoline) were, as a matter of State statutory construction, not subject to Tennessee taxation, but were subject to inspection by the State and a charge representing the reasonable cost thereof. As to the gasoline and the tractor fuel, the Chancellor allowed the State to recover $2,593.85, on the theory that this sum represented the actual cost of inspection (or a fee of 1/25 of 4/10 of a cent per gallon), of the 16,211,571 gallons of gasoline which he found to have been inspected.

As to the kerosene involved (10,159,603 gallons), the Chancellor held that, as a matter of State statutory construction this kerosene was subject both to taxation and to inspection by the State of Tennessee. The Chancellor further held that the inspection fee laws, as thus applied to the kerosene, do not violate either the commerce clause

(Article I, Section 8) of the Constitution of the United States or the Fourteenth Amendment to the Constitution of the United States.

The Chancellor further found that 2,422,931 gallons of the kerosene were never inspected by the State, and deducted from the amount sought to be recovered by the State on the kerosene $387.67, or what the Chancellor found to be the reasonable cost of inspecting this kerosene which was never inspected (1/25 of 4/10 of a cent per gallon). Even as to this kerosene which was never inspected, however, the Chancellor imposed a tax liability of 24/25 of 4/10 of a cent per gallon.

The Chancellor decreed that the State should recover from the defendant (1) the sum of $2,593.85 as the cost of inspection of the gasoline involved, and (2) the sum of $40,250.74 as taxes and cost of inspection of the kerosene involved. Of this recovery on kerosene, $1,237.87 represented the alleged cost of inspection and $39,012.87 represented privilege taxes. The costs were divided between the parties.

A copy of the Chancellor's opinion and decree of June 4, 1940, is attached hereto as Exhibit A and made a part hereof. A copy of the memorandum opinion of the Chancellor in the companion case previously decided by him, entitled *The Texas Company* v. *George F. McCanless, Commissioner, etc.,* Rule No. 54815, filed May 15, 1940, which is referred to in the decree filed in this cause on June 4, 1940, is attached hereto as Exhibit B and made a part hereof.

Both the State and the defendant appealed from the Chancellor's decree to the Supreme Court of the State of Tennessee.

Standard Oil Company of Louisiana, the defendant below, pressed in the State Supreme Court the same issues and contentions that it had raised in the Chancery Court. In addition it contended that the attempted classification be-

tween kerosene and gasoline would violate the due process and equal protection clauses of the Constitution of the United States. A true copy of the assignment of errors which Standard Oil Company of Louisiana filed in the Supreme Court of Tennessee in connection with this appeal, certified by the Clerk of the Supreme Court of Tennessee, is attached hereto as Exhibit C and made a part hereof. (This assignment of errors, according to the practice in Tennessee, was not filed as a part of the bound record in this cause, but was filed with the brief and argument of the appellant, being pp. 12-15 thereof.)

The Supreme Court of Tennessee, by a divided court of three justices against two, affirmed the decree of the Chancellor on May 8, 1941. The court also added interest to the amounts awarded to the State in the Chancellor's decree and assessed one-third of the costs of appeal against Standard Oil Company of Louisiana and two-thirds of such costs against the State of Tennessee.

The Chief Justice of the Supreme Court of Tennessee wrote the majority opinion in favor of affirmance of the Chancellor's decree, which opinion is attached hereto as Exhibit D, and made a part hereof. Associate Justice A. W. Chambliss wrote a separate concurring opinion which is attached hereto as Exhibit E and made a part hereof. Associate Justice D. W. DeHaven wrote a separate opinion in which he concurred in the majority opinion with respect to gasoline and tractor fuel but dissented from the holding of the majority with respect to the kerosene involved. A copy of Justice DeHaven's concurring and dissenting opinion is attached hereto as Exhibit F and made a part hereof. Special Judge Frank T. Fancher wrote a separate opinion in which he concurred in the opinion and conclusions of Justice DeHaven. A copy of Judge Fancher's opinion is attached hereto as Exhibit G and made a part hereof.

On the same day that the Supreme Court of Tennessee decided this cause, it decided the companion case of *The Texas Company* v. *George F. McCanless, Commissioner, etc.*, and the opinion of the Chief Justice in this companion case, which is referred to in his majority opinion in this case (Exhibit D hereto) is attached hereto as Exhibit H and made a part hereof.

A first petition for rehearing herein on behalf of Standard Oil Company of Louisiana was duly filed, was entertained by the court, but was denied on May 17, 1941. A copy of the opinion by Chief Justice Green denying this first petition to rehear is attached hereto as Exhibit I and made a part hereof.

A second petition for rehearing herein on behalf of Standard Oil Company of Louisiana was filed within the alloted time, was entertained by the Supreme Court, but was denied on June 28, 1941. The opinion of Chief Justice Green denying this second petition for rehearing is attached hereto as Exhibit J and made a part hereof.

Upon the denial by the Supreme Court of Tennessee of the second petition for rehearing, the decree and decision of said court became final for purposes of review by appeal to the Supreme Court of the United States. By said final decree in the highest court of the State of Tennessee, there was drawn in question the validity of the so-called inspection fee laws of Tennessee (Tennessee Code Sections 6809 *et seq.*, particularly Sections 6817, 6818 and 6821 thereof), on the ground that such statutes, as construed and applied herein, are repugnant to the Constitution of the United States; and said final decision and decree was in favor of the validity of such statutes as so construed and applied.

On July 9, 1941, an order staying execution herein against Standard Oil Company of Louisiana, pending its appeal to the Supreme Court of the United States, was signed by Chief Justice Green of the Supreme Court of Tennessee.

This order and a supersedeas bond of Standard Oil Company of Louisiana, with good and sufficient security, as approved by Chief Justice Green, were filed on the same day.

V.

The Substantial Federal Questions Involved and the Cases Sustaining Jurisdiction.

Several important and substantial Federal questions are involved. This appeal primarily and directly relates to the imposition of so-called "inspection fees" on the kerosene of the appellant which passed through the State of Tennessee during the three year period commencing October 1, 1936. But the importance and substantiality of the Federal questions herein presented are not limited to that particular product or period, and are by no means confined to the amount of money directly involved in this appeal, although that sum is considerable.

The Chief Justice of Tennessee, in the majority opinion written by him herein (Exhibit D hereto), expressly recognized the importance of the Federal questions involved and the fallibility of the Supreme Court of Tennessee in attempting to determine them.

He said in this regard:

> "It is a matter of gratification, therefore, that errors on our part in such matters can be corrected."
>
> • • • • • • •
>
> "Counsel for defendant press upon our consideration a discussion of the Berwind-White and earlier cases by Professor Powell in Harvard Law Review, Vol. 53, No. 6, p. 909. Among other things the learned commentator takes the position that when a use tax is imposed with respect to goods introduced from sister States, a distinction should be made in favor of wholesalers and jobbers who receive and store goods awaiting orders from other States. This, because he thinks

the ultimate burden in such case will fall on the consumers in other States. However, it is recognized that the Supreme Court has not made such a distinction yet and, as an inferior tribunal herein, we think it more seemly to endeavor to follow the higher authority than to pioneer."

(1) The main Federal question is whether or not a State may, consistently with the commerce clause of the Constitution, impose a prohibitive levy on articles of commerce originating elsewhere and passing through the levying State to other States in an established and continuous stream of interstate commerce.

There is no room for speculation as to the evil consequences that would result to interstate commerce if the toll sought to be collected in this case were sustained. It is conclusively established in the record of this cause that, if the established course of interstate commerce from Baton Rouge, Louisiana, through Memphis, Tennessee, to other States is burdened with the additional charge of 4/10th of a cent per gallon (the amount sought to be collected herein) then that commerce would be destroyed completely (R. 50-57, 136-140, Exhibit 10 to Stipulations).

The uncontroverted proof in the record is as follows: For many years the appellant has transported large and substantial quantities of petroleum products from its refinery in Baton Rouge, Louisiana, by river to Memphis, Tennessee, and has than transshipped them to destinations in States other than Tennessee. This method of transportation has given it an advantage in cost over other methods and routes of transportation available to it with respect to petroleum products destined to States other than Tennessee. But this transportation advantage has not been and is not now as great as 4/10th of a cent per gallon (the amount of the inspection fee toll), except with respect to a few points in close proximity to Memphis, Tennessee. And the volume

of products destined for such few points would not justify the expense of maintaining separate export tankage at Memphis for use in their transshipment (R. 50-57, 136-140, Exhibit 10 to Stipulations). The Tennessee barrier, therefore, is prohibitive. To it, moreover, must be added the barriers imposed by other States against the same stream of commerce.

The record further shows: These petroleum products were never received in Tennessee for any purpose except to facilitate and expedite their further transportation to other States, and the temporary storage in Tennessee was merely incidental to that further transportation. The most economical and expeditious method of transferring appellant's petroleum products from river barges into railroad tank cars for continued transportation is to use river tankage as a conduit from the river barges to the railroad tank cars. And these products were actually shipped from the river tankage at Memphis, Tennessee, to the State of destination without more delay than was necessary for the orderly and economical transshipment of the products (R. 64-66, 126-127, 132-133, 136).

On these facts the appellant claims that its petroleum products, while passing through the separate export tanks at Memphis, Tennessee, are rendered immune from Tennessee taxation by the commerce clause of the Constitution of the United States, on at least three sound legal theories:

(a) *The products never had a taxable situs in Tennessee for any purpose, but remained in the course of their interstate transportation while temporarily stored in the separate export tanks at Memphis.*

Western Oil Refining Co. v. *Lipscomb* (1917), 244 U. S. 346;

Eureka Pipe Line Co. v. *Hallanan* (1921), 257 U. S. 265;

United Fuel Gas Co. v. *Hallanan* (1921), 257 U. S. 277;
B. & O. S. W. R. R. Co. v. *Settle* (1922), 260 U. S. 166;
Carson Petroleum Co. v. *Vial* (1929), 279 U. S. 95;
United States v. *Erie R. R. Co.* (1929), 280 U. S. 98;
W. J. Lake & Co. v. *King County* (Apr. 17, 1940), 103 Wash. 430, 101 Pac. (2d) 357; certiorari denied Dec. 23, 1940, in — U. S. —, 85 L. Ed. (Ad. Ops.) 281.

(b) *An excise tax (such as 24/25 of the inspection fee involved here) imposed by an intermediate state in the stream of commerce, measured by the volume of goods sold and used in other states or the gross receipts from the sale of such goods, is an unconstitutional burden on interstate commerce.*

Gwin, White & Prince v. *Henneford* (1939), 305 U. S. 434;
Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307;
Crew Levick Co. v. *Pennsylvania* (1917), 245 U. S. 292;
Heyman v. *Hays* (1915), 236 U. S. 178, 185-186;
See: *McGoldrick* v. *Berwind-White Coal Mining Co.* (Jan. 19, 1940), 309 U. S. 33;
Powell, "New Light on Gross Receipts Taxes" (1940), 53 Harvard Law Review, 909;
"The Commerce Clause and States Sales Taxes; Recent Developments" (1938), 48 Yale Law Journal, 273.

The "inspection fees" involved are privilege or excise taxes and not ad valorem taxes.

State of Tenn. v. *Nashville C. & St. L. R. R.* (1940), 176 Tenn. 15, 137 S. W. (2d), 297.

(c) *The collection of the "inspection fees" would effect an illegal discrimination against interstate commerce.*

The inspection fee laws of Tennessee were amended by Chapter 12, Acts of 1929, which added the words "and/or

stored" thereto. Prior to 1929, sale or use of petroleum products within Tennessee was already subject to inspection fees under these laws, Accordingly, the words "and/or stored" inserted by this amendment could not raise additional revenue for the State from products sold and used within its borders, but only from products stored in Tennessee for sale and use in other States. Such a specific design to tax storage for export amounted to intentional discrimination against such storage.

McCallen Co. v. *Massachusetts* (1929), 279 U. S. 620;

Cf. *Educational Films Corp.* v. *Ward* (1931), 282 U. S. 379, 392-4.

Apart from the form and the history of the attempted exaction, the effect of it is clearly discriminatory. The so-called inspection fee of 4/10ths of a cent per gallon, when uniformly imposed on all petroleum products sold and used in Tennessee, can be passed on to the consumers of such products in Tennessee. But the same levy of 4/10ths of a cent per gallon on products temporarily stored in Tennessee for sale and consumption in other States can not be passed on to the consumers in such other States. Products bearing the burden of this Tennessee toll could not be sold in States other than Tennessee in competition with products which do not bear the burden of the Tennessee toll. The effect of the inspection fee laws, as construed by the Supreme Court of Tennessee and applied in this case, is, therefore, discriminatory in favor of products coming into the State for sale and consumption within its borders and against similar products coming into the State for further export to other States. Such discrimination is invalid, regardless of what form it may take.

Hale v. *Bimco Trading Co.* (1939), 306 U. S. 375;

Cf. *Gregg Dyeing Co.* v. *Query* (1932), 286 U. S. 472, 476, *et seq.*

(2) Another substantial Federal question involved here is whether or not a State may, under the Constitution, charge products passing through it with a fee for inspection (held by the State Courts to represent the reasonable cost of inspection) even though the inspection is not reasonable and no cost of inspection is actually incurred by that State.

The highest Court of the State of Tennessee has awarded to the State a recovery of expense to which the State was not put. The State Court relied entirely on a statement by an agent of the Department of Finance and Taxation of Tennessee to the effect that, according to his best estimate, the cost of making inspections of petroleum products and of making collections of inspection fees over the State at large amounted to approximately 1/25 of the so-called inspection fee of 4/10 of a cent per gallon (Exhibit 14 to Stipulations, R. 190-191). This proof has no connection with the petroleum products here involved.

With reference to the petroleum products involved in this cause, the evidence was undisputed that the Department of Finance and Taxation simply made out bills for inspection fees based upon reports made to the Department by petitioner (R. 175). The inspectors of the Department of Finance and Taxation made no reports whatever to the Department with respect to petroleum products placed in petitioner's separate export tanks at Memphis and subsequently exported to other states. As to barges and barge compartments which were unloaded wholly into export tanks, the inspectors took no samples. As to barges and barge compartments unloaded partially into the export tanks and partially into the domestic tanks, the inspectors took samples for the sole purpose of reporting the gallonages which went into the domestic tanks (R. 187-189, 190). The cost for

taking these samples was attributable to the domestic gallonages in the evidence relied upon by the State Court (R. 190-191). Since it is attributable to the domestic gallonages, it cannot be again attributable to the export gallonages. This is simply a matter of mathematics, if a theoretical rather than a practical view of the facts is taken. If a practical view of the facts is taken, there was no inspection at all of the export gallonages.

There is no sound reason for subjecting the petroleum products involved in this cause to inspection by the State of Tennessee. Such inspection cannot be designed to protect the consuming public within Tennessee from the sale and use of deleterious, adulterated, misbranded, or dangerous substances, and it cannot be designed to protect the Tennessee public from any harm that might conceivably result from the temporary storage within the State of uninspected volatile substances. No penalties are provided for such temporary storage of uninspected products and there is no evidence of any purpose or policy on the part of the State to prevent such storage.

The products here involved, if inspected at all, were inspected before the unloading and storage thereof, and thus while they were still in interstate transit.

Texas Co. v. *Brown* (1922), 258 U. S. 466.

A State may not subject products moving in interstate commerce to unreasonable inspection or to an unreasonable cost for inspection. Here, neither the inspection itself (assuming it was made) nor the charge therefor was reasonable.

Railroad Co. v. *Husen* (1877), 95 U. S. 465, 472-4;
Minnesota v. *Barber* (1890), 136 U. S. 313;
Brimmer v. *Rebman* (1891), 138 U. S., 78;
Hale v. *Bimco Trading Co.* (1939), 306 U. S., 375.

The inspection fees here involved are neither bona fide tax measures nor bona fide police measures and they are, therefore, void in their entirety.

Postal Telegraph-Cable Co. v. *New Hope* (1904), 192 U. S., 55;
Telegraph-Cable Co. v. *Taylor* (1904), 192 U. S., 64;
Foote Co. v. *Maryland* (1914), 232 U. S., 494;
Standard Oil Co. v. *Graves* (1919), 249 U. S., 389;
Phipps v. *Cleveland Refining Co.* (1923), 261 U. S., 449;
Great Northern Ry. Co. v. *Washington* (1937), 300 U. S., 154, 161.

(3) Another important and substantial Federal question is whether or not the construction of the inspection fee laws by the State of Tennessee so as to impose a tax on kerosene temporarily stored, while exempting gasoline similarly stored, would amount to an unreasonable and arbitrary discrimination against kerosene and the distributors thereof in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Tennessee, in its opinions, held that Section 1140 of the Tennessee Code which exempts gasoline stored for export from the Tennessee sales and use tax on gasoline must be construed as exempting gasoline (but not kerosene) from taxation in the guise of "inspection fees" under Section 6817 of the Code.

Under Section 1126 of the Tennessee Code, gasoline is defined as a petroleum product flashing at less than 112° Fahrenheit. It is solely because the kerosene here involved flashes at more than 112° Fahrenheit that the Supreme Court subjected it to taxation under the inspection fee laws. This attempted classification is so palpably arbitrary that

it violates both the equal protection and the due process clauses of the Constitution of the United States.

Airway Electric Appliance Corp. v. *Day* (1924), 266 U. S. 71;

Ohio Oil Co. v. *Conway* (1930), 281 U. S. 146;

Washington v. *Inland Empire Refineries* (Apr. 26, 1940), —— Wash. ——, 101 P. (2d), 975, certiorari denied Dec. 23, 1940, —— U. S. ——, 85 L. Ed. (Ad. Ops.) 281.

In the final decision of the highest Court of the State of Tennessee, which is sought to be reviewed herein, several Federal questions of great importance have been decided. Certain of these Federal questions have not been determined heretofore by the Supreme Court of the United States; and on all these questions the decision of the State Court was probably not in accord with the applicable decisions of the Supreme Court of the United States. Jurisdiction is beyond cavil.

Respectfully submitted,

T. M. Milling,
New Orleans, Louisiana;
Armistead, Waller, Davis & Lansden,
By J. P. Davis,
American Trust Building,
Nashville, Tennessee,
Solicitors for Petitioner and Appellant,
Standard Oil Company of Louisiana.

Appendix.

EXHIBIT A.

IN THE CHANCERY COURT AT NASHVILLE, TENNESSEE, PART TWO.

54993.

STATE OF TENNESSEE, EX REL.,

v.

STANDARD OIL COMPANY OF LOUISIANA.

This cause came on to be heard on this June 3, 1940, before Chancellor James B. Newman, on the entire record and oral argument of solicitors;

From all of which the Court finds:

(a) That the gasoline and tractor fuel involved is not subject to any tax liability except that part of the gasoline (16,211,571 gallons) which was inspected. The actual cost of this inspection is $2,593.85.

See Memo. Opinion of the Chancellor in the case of The Texas Company *v.* Geo. F. McCanless, Commissioner, etc., Rule No. 54815, filed May 15, 1940.

State *v.* N. C. & St. L. Rwy., 137 S. W. Reporter (2nd) Issue April 2, 1940, page 297.

(b) That the kerosene involved in this suit, (10,159,603 gallons) is subject to the inspection fees sued for, but there cannot be included in these inspection fees the actual cost of inspection where no inspection was made, (2,422,931 gallons). The actual cost of inspection where no inspection was made amounts to $387.67.

It is therefore ordered, adjudged and decreed by the Court:

1. That the complainant have and recover of the defendant the sum of $2,593.85, the actual cost of inspection of the gasoline involved.

2. That complainant have and recover of the defendant the sum of $40,250.74 due on the kerosene involved.

The costs of the cause will be paid one-half by the complainant in the manner provided by statute, and one-half by the defendant.

To so much of the foregoing decree as denies it a recovery for any part of the tax sued for and assesses it with one-half of the costs, the complainant excepts and prays an appeal to the present term of the Supreme Court sitting at Nashville, which is by the Court granted. The State being the appealing party, no bond will be required.

To so much and such parts of the foregoing decree as adjudges it liable for any portion of the tax sued for and assesses it with one-half of the costs, the defendant excepts and prays an appeal to the present term of the Supreme Court sitting at Nashville, which is by the Court granted upon its executing bond conditioned as required by law, and it is allowed thirty days from the entry of this decree in which to prefect its appeal.

By consent it is further ordered that the Clerk and Master will attach to the transcript and send up in their original form, all exhibits filed in this cause, except Exhibits 3, 4, 5, 6, 13 and 14, to the stipulation filed April 26, 1940, which exhibits shall be copied in the transcript.

Approved for entry:

W. F. Barry,
Dudley Porter, Jr.,
Solicitors for Complainant;
T. M. Milling,
McConnico, Armistead, Waller & Davis,
Solicitors for Defendant.

EXHIBIT B.

IN CHANCERY COURT, PART TWO.

54815.

THE TEXAS COMPANY,

vs.

GEORGE F. McCANLESS.

Memorandum Opinion.

This suit was instituted by the complainant against George F. McCanless, Commissioner of Finance & Taxation of Tennessee and other State officials, to recover $286.80 inspection fees paid at the rate of 20¢ per barrel on 1434 barrels of gasoline stored in Tennessee during the month of July, 1939. These fees were paid under protest by complainant on August 21, 1939, and the suit to recover same was filed on September 7, 1939.

It is in substance averred in the bill that none of the gasoline upon which the inspection fees were paid, was previously the subject of an original sale in Tennessee, nor was it sold, used or distributed or stored for the purpose of sale, use or distribution in Tennessee, but was temporarily stored in separate interstate transit tanks in the State of Tennessee marked "export tank" and sent on in less than sixty days from the date of its receipt to stations in other States, as soon as transportation facilities were conveniently available. The gasoline that passed through the "export tanks" belonged to complainant before it reached Tennessee, while it was passing through such interstate transit tanks and until after it reached its destination outside of Tennessee, originally and at all times intended. That complainant literally complied with the regulations contained in Sec. 1140 of the Code as amended (See corresponding section of Williams Code), and that all of the gasoline was handled through a separate interstate transit tank marked "export tank" which was and is used exclusively for gasoline that moves in the flow of interstate commerce and no gasoline

was withdrawn from said tank and shipped to points in Tennessee.

Complainant further avers that none of this gasoline acquired a taxable situs in Tennessee within the meaning of the applicable Tennessee statutes, and should not be included in the measure of its tax liability; that if the regulations of Sec. 1140 of the Code as amended are complied with, such gasoline is considered and classified as gasoline moving in interstate commerce. Furthermore, all this gasoline was being transported in interstate commerce from the time it left the refinery, while it was temporarily held in said separate export tanks and until it arrived at points outside of the State of Tennessee.

It is further alleged that the gasoline did not come to rest in Tennessee within the meaning of the commerce clause of the Federal Constitution and is not subject to the tax imposed and sought to be recovered. The complainant seeks a decree that the tax was wrongfully paid and should be refunded.

The defendants answered and admitted that the tax was paid under protest, averred that the inspection fees were legally assessed and collected and challenged the right of the complainant to recover any part thereof. The following stipulations were filed in the case:

"STIPULATION."

"In this cause it is agreed by the parties, that for the purposes of this case and this case alone, the following facts are true:

1. All of the gasoline here involved was shipped in railroad tank cars from complainant's refinery outside the State of Tennessee to complainant's storage plants in Memphis, Kingsport and Union City, Tennessee, and was there placed in separate "export" tanks; all of the said gasoline was stored in the said "export" tanks for varying periods of less than sixty days; and all of the said gasoline after its storage in the said "export" tanks was transported, in tank wagons owned or controlled by complainant, to points outside of the State of Tennessee.

2. The complainant has both "domestic" tanks and "export" tanks at Memphis, Kingsport and Union City, Ten-

nessee, and it stores in the said "domestic" tanks gasoline which is eventually sold, used or distributed in the State of Tennessee. Gasoline is shipped in railroad tank cars from complainant's refinery outside of the State to complainant's storage plants at Memphis, Kingsport and Union City, and upon arrival at such storage plants, the said gasoline is placed in complainant's "domestic" tanks and "export" tanks in such amounts and proportions as the varying needs of complainant's domestic business and export business require at the particular time of each such arrival.

3. All of the gasoline here involved was at all times handled in strict compliance with all of the requirements and provisions of Code Section 1140 as amended. That is to say, none of the said gasoline was previously the subject of an original sale in Tennessee, nor was any of it sold, used or distributed in the State of Tennessee; all of the said gasoline was stored for less than sixty days in storage tanks marked "export Tank"; a bond such as is required by Code Section 1140 as amended was duly executed by complainant; and all of the said gasoline was shipped to points outside Tennessee.

4. The "export" gasoline here involved was trucked from complainant's "export" tanks at Memphis, Kingsport and Union City, Tennessee across the State line to complainant's customers in other states, on standing orders for the purchase of gasoline by such customers placed with complainant's storage plants in Memphis, Kingsport and Union City respectively, such orders varying in amount and frequency from time to time according to the needs and requirements of said customers, which are principally retail outlets. The complainant keeps a supply of gasoline on hand in its separate "export" tanks in Memphis, Kingsport and Union City in order that said orders from its customers in other states may be promptly filled as occasion may require, and the complainant bases its estimate of the amount of gasoline that it is necessary to keep on hand in its "export" tanks to promptly supply the said orders, on past experience.

The principal reason for the maintenance of complainant's "export" tanks at Memphis, Kingsport and Union

City, Tennessee is that some of complainant's customers in other states are not close enough to complainant's bulk plants in such other states to enable complainant to profitably haul gasoline from such bulk plants to such customers, because gasoline cannot be profitably transported for great distances, and the complainant can and does economically supply gasoline to said customers in other states from its "export" tanks in Tennessee, the said customers in other states in most instances being located only a few miles from the Tennessee State line and complainant's "export" tanks in Tennessee.

The time of the sending of the gasoline from complainant's "export" tanks to points in other states is not dependent upon the availability of convenient transportation facilities, but is dependent upon the varying needs and requirements of complainant's customers in other states to which the gasoline is transported.

5. No gasoline has been withdrawn from complainant's "export" tanks and shipped to points in Tennessee.

6. All of the gasoline here involved was actually inspected, and the actual cost of inspection amounted to approximately 1/25 of the inspection fees collected from the complainant.

SEAY, STOCKELL & EDWARDS,
Solicitors for Complainant.
W. F. BARRY,
DUDLEY PORTER, JR.,
Solicitors for Defendants."

In the oral argument and on brief it was insisted by the complainant:

(a) That Sections 6817, 6818 and 6821 of the Code of 1932 as amended (See corresponding sections of the Williams Code) providing for the inspection of gasoline and the fee to be charged therefor and Sec. 1140 of the Code as amended (See corresponding section of the Williams Code) exempting gasoline stored in tanks marked "export tank" from tax liability for a period of sixty days are in *pari materia* and should be construed together and when so con-

strued they remove gasoline that is stored in a separate tank marked "export tank" for a period of sixty days, from tax liability of any character.

(b) That the State by the enactment of Sec. 1140 of the Code as amended, has expressly provided for separate storage tanks to be marked "export tank" for the storage of gasoline moving in the channels of interstate commerce, and that gasoline so stored for export to points outside of the state within sixty days, is gasoline moving in the flow of interstate commerce and is not subject to any tax imposed by the State on gasoline.

The State insists that Sec. 1140 of the Code as amended is a statute that only exempts gasoline from the tax of 7¢ on each gallon and the inspection statutes relating to gasoline cannot be construed in connection therewith. If the frist insistence of the complainant is a correct interpretation of sec. 1140 of the Code as amended, then we would have a statute exempting from all character of gasoline taxes, gasoline that was shipped into the state and stored in a tank marked "export tank", while the same taxes could be imposed and collected on gasoline shipped into the state and placed in tanks not marked "export tanks".

If the insistence of the State be correct that sec. 1140 of the Code as amended, is an exemption statute applying alone to gasoline tax of 7¢ on each gallon, and has no application to the tax imposed by the inspection statutes, notwithstanding that this exemption is applied by express provision of Chapter 77, Acts of 1933, to the inspection feature of the Act, after gasoline is stored for the purpose of sale, exportation and shipment out of the state, then we would have a statute which granted an exemption for the 7¢ tax on each gallon of gasoline stored in export tanks, and yet the same character of shipment of gasoline in other tanks would be liable for the 7¢ gasoline tax and all gasoline shipped in the State would be liable for the inspection tax except that covered by the provisions of Chapter 77 of the Acts of 1933. Either of these constructions, if correct, render Sec. 1140 of the Code as amended, and that part of Chapter 77 of the Acts of 1933 exempting from the inspection fee the gasoline covered by the provisions of that Act, unconstitutional.

The construction of Sec. 1140 of the Code as amended was before the Supreme Court in the case of Texas Co. *v.* Fort, 168 Tenn. p. 679, where it was held that the amendatory Act, chapter 130 of the Acts of 1933, providing for export tanks was germane to Sec. 1140 of the Code of 1932 which was a provision that the gasoline tax should not apply to the sale of gasoline when sold for and exported out of the State, and was therefore constitutional. In that case it was insisted that the Act as amended imposed a tax only on gasoline imported and stored after its enactment and exempted from taxation gasoline that had been imported before and remained in storage after its enactment, and the Court ruled on page 685 of the Texas Company case, supra, that such a construction would violate the equal protection clauses of the State and Federal Constitution for the reason you would have an Act under which members of each class were doing exactly the same kind of business under the same conditions and for the same purposes, yet one was taxed and the other was exempt, and there could be no reasonable basis for such classification under the State or Federal Constitution. This reasoning is peculiarly appropriate to the constructions invoked in this case.

It is a settled law in Tennessee that a classification to be constitutional must have some basis which bears a reasonable and natural relation to the object sought to be accomplished, and that if a possible reason can be conceived to justify the classification, it will be upheld even though the reason be a poor one. But if the classification affirmatively appears to be palpably arbitrary and unreasonable, the Statute making it must fall. What reason can be conceived, good or poor, why the Legislature should permit a shipment of gasoline into the State and stored in unmarked tanks to be taxed, and the same kind of gasoline shipped under the same conditions into the State and stored in a tank marked "export tank" be exempt for sixty days from all or any form of gasoline taxation.

It is suggested in brief that a possible reason for this discrimination was that gasoline so shipped, stored and exempt from taxation might be taxed in the State into which it might ultimately move, but this reason is without any substantial or sound basis, because gasoline stored in tanks

not marked "export tanks" is subject to all character of gasoline taxes which are collectible in this State, and when shipped to another state is also subject to be taxed by that state.

The only basis that bears any reasonable and natural relation to the object sought to be accomplished that will support the classification made by Sec. 1140 of the Code as amended, is that the Legislature in the enactment of this amendatory act regarded such gasoline shipments as moving in interstate commerce and not subject to gasoline taxation of any character except for the actual cost of inspection, and thus permitted it to retain its interstate character while it remained in the state for sixty days. It is only upon the theory that the Legislature has given to gasoline shipped into the state and stored in a tank marked "export tank", and from that tank exported out of the state, the character of an interstate commerce shipment while so stored that the classification can be sustained.

It is held in the Texas case, *supra,* that where a statute is capable of two constructions it must be given that construction which will sustain it and not that construction which will destroy it. If this statute, Sec. 1140 of the Code as amended, is construed as a statute not relating to interstate commerce, but in the manner as insisted on by the complainant in one of its insistences, and by the defendants, then the statute must necessarily fall as being arbitrary and capricious. While if the statute is construed as having reference to shipments of goods that move in interstate commerce from another State to this State, and by authority of the State are permitted to remain in the State for sixty days if stored in export tanks, and then exported to another State, and by reason of and while in such export tanks are recognized by express legislation of the State to be still in interstate commerce, and therefore not subject to gasoline taxation of any character, its constitutionality can be preserved and only this view will preserve it. Can the State enact legislation permitting gasoline shipments moving in interstate commerce to stop in the State for sixty days, if certain things are done, without being subject to tax liability, and yet while it so remains by invitation of the State, levy inspection fees thereon which

the Supreme Court has construed as largely an excise or privilege tax? Can it lull the shipper into a sense of security, and then tax, when otherwise he might have continued the shipment in the flow of interstate commerce?

If as ruled in the unreported case of the State of Tennessee *v.* Texas Co. decided by the Supreme Court in July, 1938, that the State, through certain officials may so act to mislead a taxpayer so the State could not recover the privilege tax imposed by and due under a statute, certainly the State cannot enact a statute inviting a course of conduct by a taxpayer handling goods in interstate commerce, and after the shipper has acted under this Act, the State can then levy another tax on the shipment while here. The right of the State to levy and collect inspection fees to the extent of the actual cost of the inspection of goods moving in interstate commerce, is authorized by the Federal Constitution.

Every person must so use his own as not to do wrong to another, and there is no natural right to handle gasoline without restraint because it is intrinsically a dangerous substance.

See Foster & Creighton Co. *v.* Graham, 154 Tenn. 423.

The State under its police power to protect the health, peace and general welfare of the public may impose and collect an inspection fee in amount limited to the actual cost of the inspection on shipments moving in interstate commerce.

The State may, in the exercise of its police power, inspect and collect fees upon inflammable products as a means of safety, even though moving in interstate commerce, but these inspection fees cannot exceed the reasonable cost of inspection. However, after the products have ceased to be in interstate commerce, the State may impose inspection fees as a means of providing general revenue in excess of the cost of inspection.

See State *v.* Reed Oil Co., S. W. Rep. Issue April 2, 1940, page 295.

In the case under consideration, there is no difficulty in separating the fee charged for inspection and that part of

the fees that are charged as revenue. It appears from the stipulation that the cost of inspection was 1/25 of the tax collected, and since the complainant paid the tax in full and was liable to the State for the actual cost of inspection upon equitable principles, it should not be allowed to recover back the actual cost of inspection.

See State *v.* Nashville Chatt. & St. L. Rwy., S. W. Rep. Issue Apr. 2, 1940, pps. 299-300.

The stoppage and storage of gasoline in tanks for sixty days by invitation of the State which was shipped in interstate commerce from another State, was not the voluntary act of the shipper, but was brought about by the act of the State itself, and therefore did not affect the continuous interstate shipment.

The crucial question of the right to impose local State taxation on goods moving in interstate commerce is that of the continuity of transit. If the cause of the detention is an unavoidable necessity or to protect the safe or convenient transit and the continuity of the interstate trip is not broken, then certainly the continuity of the transit should not be broken, when goods moving in interstate commerce by express permission and authority of the State are permitted to stop for sixty days and then move on to another State.

If the necessities of each particular shipment or the promotion of the safe and convenient transit will be an excuse for the detention and not affect the continuity of the shipment, no reason can be advanced why the continuity of the transit is affected by a detention by invitation and permission of the State.

The courts uniformly hold in determining whether a shipment is moving in interstate commerce or not, that the character of the shipment is determined from all the evidential circumstances looking to what the owner has done in the preparation for the journey and carrying it out, and the mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the facts show that the journey had already begun in good

faith, and the temporary interruption of the passage is reasonable.

See the case of Carson Petroleum Co. *v.* Vial, 279 U. S. 95, Supreme Court Rep. Vol. 49, p. 292.

The opinion in the *Carson* case was delivered by Chief Justice Taft and is a learned and exhaustive statement of the law of interstate commerce, reviewing many of the leading cases of that court up to the date of the decision. In that case Chief Justice Taft speaking for the Supreme Court criticises the case of General Oil Co. *v.* Crain, 209 U. S. p. 211 (28 Supreme Court Reporter p. 475). In discussing the facts and law of that case he said that after a time, and in order to escape local inspection tax, part of the oil was deposited in stationary tank No. 1, marked "oil already sold in Arkansas, Louisiana and Mississippi", while local oil and that yet to be sold was kept in other tanks. The oil in tank No. 1 was divided according to orders already received into barrels and larger containers to be forwarded to customers in other States. It was held that the doings of the company in thus separating the oil after it reached Memphis was itself a local business in Memphis, and that the delivery in Memphis of the oil and its subsequent shipments, made two separate interstate shipments and permitted local taxation on oil while it awaited the second shipment. He referred to the fact that there was a very vigorous dissent in that case and that it was a close case and might have been decided the other way and was probably affected by the impression created by the original situation.

Speaking for the Court he expressly stated that since that decision the Court had considered a number of cases and had given a liberal construction of what is continuity of the journey in cases where the Court found from the circumstances that export trade had been actually intended and carried through.

Cases were referred to which greatly weakened the holding in the *Crain* case, and that holding was limited to the facts of the *Crain* case. The *Crain* case is easily distinguishable from the case at bar, because in that case it was

the voluntary action of the shipper in putting the oil in tanks marked "oil already sold in Arkansas" etc. and it was done by the shipper to escape local taxation. No such facts exist in the case here, because the oil in storage was placed there under statutory provision and thereby expressly exempt from the 7¢ tax on each gallon of gasoline if not from all gasoline taxation.

The Court is of opinion for the reasons indicated, that the fees involved were wrongfully collected and ought to be refunded, except 1/25 of the amount of said fees, or $11.97, which represents the actual cost of the inspection that was made by the State, and this sum complainant is not entitled to recover.

Decree accordingly.

—— ——, Chancellor.

EXHIBIT C.

Assignment of Errors.

(Filed by Standard Oil Company of Louisiana on its appeal to the Supreme Court of the State of Tennessee)

I.

The Chancellor erred in finding and holding that the kerosene involved in this cause is subject to the inspection fees sued for, (subject to a deduction of what was found to be the actual cost of inspection where no inspection was made), and in awarding to complainant a decree against defendant in the sum of $40,250.74 for inspection fees on said kerosene (R. 204).

This was error for the reasons, among others, that:

(a) The inspection fee laws were never intended to apply to kerosene or to any other petroleum product temporarily stored in a separate export tank in this State for less than sixty (60) days and then shipped to other States for sale and use in other States, especially where the storage in Tennessee and subsequent shipments to other States were handled in compliance with the January 20, 1931, Regulation of the Department of Finance and Taxation, approved by

the Attorney General, designated Supplement F, Regulations No. 8, as revised June 2, 1933 (Appendix, pp. vii and xiii).

(b) The imposition of said inspection fees on said kerosene would be in violation of the commerce clause of the Federal Constitution, because said petroleum products were stored in Tennessee merely as an incident to their interstate transportation from Louisiana to points in Arkansas and Mississippi, and never became subject to Tennessee taxation.

(c) If said inspection fee laws be construed to impose a privilege tax for storing petroleum products in Tennessee and to measure said tax by the volume of said petroleum products sold and used in other States, they would burden and discriminate against interstate commerce in violation of the commerce clause and the Fourteenth Amendment of the Federal Constitution, Article I, Section 8, and Article 11, Section 8, of the Tennessee Constitution.

(d) If said inspection fee laws be construed as applicable under the circumstances of this case to kerosene and other petroleum products flashing at higher than 112 degrees Fahrenheit, but inapplicable to gasoline and other petroleum products flashing at less than 112 degrees Fahrenheit, then such purported classification would amount to an unreasonable and arbitrary discrimination against distributors of the former class of petroleum products in violation of the Fourteenth Amendment of the Federal Constitution and Article I, Section 8, and Article 11, Section 8, of the Constitution of Tennessee.

II.

The Chancellor erred in finding and holding that any of the petroleum products involved in this cause were inspected and in finding and holding that the actual cost of their inspection was one-twenty-fifth of four-tenths of a cent per gallon, and in awarding a decree in favor of complainant and against defendant in the sum of $2,593.85, on the theory that this was the actual cost of inspection of gasoline which was inspected. (R. 204).

This was error for the reasons, among others, that:

(a) The inspection fee laws were not applicable to said gasoline, (for all the reasons set out under Assignment I), and if it was inspected the inspectors acted illegally.

(b) There was no evidence whatever that the inspectors even pretended to inspect any of the gasoline here involved. (R. 187-189, 201).

(c) There was no basis in the record for the exercise by the Chancellor of the legislative function of determining the actual cost of inspection, and no evidence from which it could be determined, with reasonable certainty, what would have been the actual cost of inspection of the gasoline in question,—the only evidence on the subject being a stipulation as to the approximate cost of inspection of petroleum products throughout the State (R., 190-191).

(d) The inspection fee laws would not be reasonable police measures if construed to require the inspection of products to be sold or used in other states than Tennessee; and the burdening of such products with the cost of such unreasonable inspection would be a denial of due process of law in violation of Article I, Section 8, and Article 11, Section 8 of the Tennessee Constitution and the Fourteenth Amendment of the Federal Constitution. Such unreasonable inspection would also impose an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution.

(e) Inasmuch as the inspection fees involved in this cause, though partaking of both powers, cannot be attributed to the taxing power alone or to the police power alone, and cannot be apportioned between such powers, said fees are void in their entirety, unless they can be sustained both as police measures and as tax measures. For the reasons given in the immediately preceding paragraphs said fees cannot be sustained under either power.

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of

the assignments of error of Appellant in said Court, at its December term, 1940, in case of State ex rel. McCanless etc. against Standard Oil Co. of La. as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the capitol at Nashville, on this, the 28th day of July, 1941.

[Seal] DAVID S. LANSDEN,
Clerk.

EXHIBIT D.

Davidson Equity.

STATE OF TENNESSEE ex rel. GEO. F. McCANLESS et al.,

v.

STANDARD OIL COMPANY OF LOUISIANA.

Opinion.

This is a suit of the State on the relation of the Commissioner of Finance and Taxation and the Attorney General to collect from defendant the so-called inspection fee said to have been imposed by sections 6809 et seq. of the Code on certain gasoline, tractor fuel, and kerosene stored in Tennessee during a three-year period beginning October 1, 1936. Defendant denied liability. The chancellor sustained the defense as to the gasoline and tractor fuel (classed as gasoline) in so far as sections 6809 et seq. imposed a tax. He held defendant liable for so much of the imposition as represented a reasonable inspection charge, shown to have been 1/25 of the exaction. The chancellor held the kerosene subject to the whole imposition except a portion of that product not actually inspected. That portion he ruled subject to the tax included in the imposition but not to the inspection charge. Both parties appealed.

The defendant handled the gasoline and tractor fuel herein involved just as The Texas Company handled the gasoline in The Texas Company v. George F. McCanless, Commissioner, et al., decided today, and on the authority of that

case the chancellor's decree with respect to the defendant's liability on account of the storage of those products is affirmed.

Section 1140 of the Code as amended by chapter 130 of the Acts of 1933, considered at length in The Texas Company v. George F. McCanless, Commissioner, does not relate to kerosene. If the kerosene handled by the defendant is to be relieved of the burden of sections 6809 et seq. of the Code it must be because the kerosene stored, upon which the imposition is based, remained in interstate commerce. The determination of this question, of course, requires consideration of the facts.

The defendant had a refinery at Baton Rouge, Louisiana. From that refinery it shipped large quantities of gasoline, tractor fuel, and kerosene to Memphis. These products were shipped in barges constructed for that purpose. The defendant maintained thirteen or fourteen large storage tanks at Memphis.

Defendant had a considerable business in Arkansas, Mississippi, Kentucky, and Missouri. Its products could be delivered more cheaply in much of that territory through shipment by water to Memphis and distribution from Memphis to certain portions of the other States by railroad tank cars.

It is not necessary to consider the methods used by defendant in handling through Memphis its Ethyl gasoline, or Esso as it is called, and its methods of handling tractor fuel. Liability for tax with respect to these products is obviated by the Act of 1933 above referred to. Indeed, defendant's liability for the tax with respect to its straight gasoline, or Essolene as it is called, handled through Memphis, is thus obviated. However, the Essolene and kerosene were handled in the same manner and consideration of the method of handling the two products becomes necessary to determine defendant's liability with respect to the kerosene.

It is to be gathered from the proof that defendant's business was well organized and that by frequent reports and investigations defendant kept well posted on the probable needs of its trade. The Essolene and kerosene distributed from Memphis by defendant was shipped in bulk to supply

the needs of defendant's whole trade out of Memphis—intrastate and interstate. When the barges containing these products would reach Memphis, such portion of the Essolene and kerosene as defendant contemplated would be needed in other States was pumped into separate tanks, marked "Export Tanks," maintained as described in The Texas Company *v.* McCanless, Commissioner, supra. The remainder of the Essolene and kerosene, intended for defendant's Tennessee business, was pumped into other tanks. There was no separation of the Essolene and kerosene for the Tennessee trade from the Essolene and kerosene for the trade in other States until the barges reached Memphis.

As above stated, the defendant maintained thirteen or fourteen storage tanks at Memphis. According to figures given in the deposition of its president, the capacity of the export tanks was 89,000 barrels, the capacity of the tanks for Tennessee business was 212,700 barrels. The capacity of the kerosene export tanks was 10,600 barrels, the capacity of the kerosene tanks for Tennessee business was 43,300 barrels. From these figures it appears that much the greater portion of defendant's products distributed from Memphis was applied to Tennessee business. As to the kerosene, less than one-fourth of that product stored at Memphis was shipped out of the State.

Referring again to the testimony of defendant's president, it appears that the amount of Essolene and kerosene allotted to export tanks when the barges reached Memphis was based on estimates of its representatives and salesmen in the export territory. Orders for the Essolene and kerosene from this export territory were not received until after the allocation. The Essolene and the kerosene in the export tanks were placed therein to await orders, although it is fair to say that the defendant was able to estimate with much accuracy the extent of these orders and quantities of these products necessary to supply the orders.

The Essolene and kerosene stored in the export tanks might have been diverted by defendant to domestic needs but according to the proof there had been no such diversion.

The defendant contends that there was no break, in the sense of the law, in the interstate journey of the kerosene

here involved from the refinery at Baton Rouge, Louisiana, until it reached its destination in Mississippi or Arkansas or State other than Tennessee. That the nature of the stop at Memphis of so much of the kerosene as went beyond the limits of Tennessee was not such as to take the product from the flow of interstate commerce. The defendant rests its contention on the line of decisions of the Supreme Court of the United States such as Texas & N. O. RR. Co. *v.* Sabine Tram Co., 227 U. S. 111; Hughes Bros. Co. *v.* Minn., 272 U. S. 469, and Carson Petroleum Co. *v.* Vial, 279 U. S. 95.

In Texas & N. O. RR. Co. *v.* Sabine Tram Co., supra, lumber was ordered manufactured and shipped from mills in Texas to a seaboard point in that State. There was no sale for lumber at this port, all the lumber was designed for export when purchased, and all of it was exported. The fact that it was shipped on local bills of lading from one point in Texas to another in that State did not stamp the shipment as intrastate, since it was designed for export. The shipper was liable for the export rate established by the Interstate Commerce Commission and the Texas intrastate rate was not applicable. There was a continuity of transportation in which the delay and transshipment in ocean vessels did not make any break.

In Hughes Bros. Co. *v.* Minn., supra, logs were cut in Minnesota and in accordance with a contract of sale were floated by river to Lake Superior and there loaded on the purchaser's ships for transportation to their destination in Michigan. It was held that these logs began a continuous interstate journey when they began their drive down the river, not when they were loaded into the vessels, and that the logs were not subject to taxation in Minnesota after the floatage in the river began. As in the *Sabine* case, it was held that a change in the method of transportation did not affect the continuity of the interstate movement.

The case of Carson Petroleum Company *v.* Vial, supra, is strongly pressed upon us by defendant's counsel both in brief and argument. In that case an exporter bought oil in interior states to fill foreign orders. The oil was shipped in railroad tank cars to a point on the Mississippi River in Louisiana and there stored in tanks. From these tanks it

was pumped into ships for transportation to foreign consignees. None of the oil was sold from the tanks to local buyers. All of it went abroad. The oil was accumulated and held in the tanks for no purpose other than transshipment to foreign countries. Under these circumstances, it was held that the oil in the tanks was not subject to tax in Louisiana.

Other cases relied on by the defendant are akin to the foregoing. In most instances the merchandise, transportation of which was halted, had been sold before the initial shipment. None of it was intended for sale or distribution at the first stop. All of it was designed for the foreign buyer. The intermediate stops were quite generally for safety or availability of further transportation—to await the arrival of ships or safe, ice-free or usable waters. We think these cases are distinguishable from the case before us. The chancellor was of opinion that the present case fell within the authority of General Oil Co. *v.* Crain, 209 U. S. 211. We are likewise of the same opinion. The holding of that case is aptly stated in the somewhat recent case of Minnesota *v.* Blasius, 290 U. S. 1, as follows:

"In General Oil Co. *v.* Crain, 209 U. S. 211, the company conducted an oil business at Memphis where it gathered oil from the North and maintained an establishment for its distribution. Part of the oil was deposited in a tank, appropriately marked for distribution in smaller vessels in order to fill orders for oil already sold in Arkansas, Louisiana and Mississippi. The Court held that the first shipment had ended, that the storage of the oil at Memphis for division and distribution to various points was 'for the business purposes and profit of the company'; and that the tank at Memphis had thus become a depot in its oil business for preparing the oil for another interstate journey."

It is likewise held in General Oil Company *v.* Crain that the storage of such oil in Memphis was a business subject to the identical imposition levied by sections 6809 et seq. of the Code.

It is said, however, that the authority of General Oil Co. *v.* Crain, supra, has been weakened by criticism of that

decision in Carson Petroleum Co. *v.* Vial, wherein it was pointed out, among other things, that the earlier decision was by a divided Court. We may, however, observe that the decision in Carson Petroleum Co. *v.* Vial was by a divided Court and that more recently General Oil Co. *v.* Crain has been frequently cited by the Supreme Court with apparent approval as in Minnesota *v.* Blasius just above referred to, Nashville C. & St. L. R. Co. *v.* Wallace, 288 U. S. 17, and quite recently in McGoldrick *v.* Berwind-White Coal Mining Co., 309 U. S. 33.

It seems to us, apart from the authority of General Oil Co. *v.* Crain, supra, the liability of defendant for the tax on the kerosene involved is sustained by several other decisions of the Supreme Court.

In what may be called the parent authority in cases like this, Coe *v.* Errol, 116 U. S. 517, logs were gathered in New Hampshire in what the Court termed an *entrepot* looking to ultimate transportation to another State. While thus stopped or stored, but before they had started on their final journey, these logs were held subject to taxation in the State of New Hampshire. In other words, the interstate movement had not begun and the mere fact that such movement was contemplated did not withdraw the property from the State's power to tax it.

A case quite in point is Atlantic Coast Line R. Co. *v.* Standard Oil Co., 275 U. S. 257. In that case oil was shipped from foreign refineries to points in the State of Florida and there stored in tanks of the oil company. From these tanks the oil was distributed in the oil company's business in the State of Florida. The question was whether there was a continuous shipment from the refineries to the points of ultimate destination in Florida. The Court held that the original shipment ended when the oil was stored in the tanks at the Florida ports. That shipments from the tanks to the other Florida points were intrastate and that intrastate rates were applicable to such reshipments.

In Minnesota *v.* Blasius, supra, cattle were consigned from other States to the stockyards in St. Paul, Minnesota. They were sold at the stockyards and were being held in pens there by the buyer, subject to his disposition. It was

held that the cattle had acquired a situs for local taxation as the buyer's property, although in the course of his business he was offering them for resale in the same market, when the tax was imposed, and sold them soon afterwards for interstate consignment. In this case it was said:

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. Coe *v.* Errol, 116 U. S. 517; Diamond Match Co. *v.* Ontonagon, 188 U. S. 82. If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. Coe *v.* Errol, supra; Kelley *v.* Rhoads, 188 U. S. 1; Champlain Co. *v.* Brattleboro, 260 U. S. 366. Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. Champlain Co. *v.* Brattleboro, supra, p. 377; Southern Pacific Terminal Co. *v.* Interstate Commerce Comm'n, 219 U. S. 498; Texas & N. O. R. Co. *v.* Sabine Tram Co., 227 U. S. 111; Carson Petroleum Co. *v.* Vial, supra. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation.' Hugh Bros. Co. *v.* Minnesota, 272 U. S. 469, 476. Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

Other decisions of the Supreme Court similar to the foregoing might be referred to but these are sufficient for illus-

tration. Cases like this, dependent upon the facts for their solution, as the Supreme Court has recognized, are difficult. The Justices of that Court quite frequently differ in their conclusions as to the proper disposition of same. That Court, dealing almost daily with questions arising under the Commerce Clause of the Federal Constitution, finds difficulty in dealing with such questions. Necessarily a Court like this, where such questions infrequently arise, has much more difficulty. It is a matter of gratification, therefore, that errors on our part in such matters can be corrected.

If the defendant here, after unloading the barges at Memphis, had stored the Essolene and kerosene indiscriminately, commingling that intended for domestic use and that intended for use out of the State, such storage would clearly have been taxable. The initial shipment having ended at Memphis, the storage of the products at Memphis was taxable until another interstate shipment had begun. It does not seem to us that the storage in separate tanks of an amount of gasoline estimated to be required to fill future orders in other States, to be shipped out when those orders were received—it does not seem to us these things amounted to the beginning of another interstate journey.

The defendant refers to a number of decisions of the Supreme Court of the United States which we do not find it necessary to consider. Cases arising under the anti-trust law and cases considering statutes regulating the purchase and sale of products in interstate commerce. These decisions are not applicable here.

Counsel for defendant press upon our consideration a discussion of the Berwind-White and earlier cases by Professor Powell in Harvard Law Review, Vol. 53, No. 6 p. 909. Among other things the learned commentator takes the position that when a use tax is imposed with respect to goods introduced from sister States, a distinction should be made in favor of wholesalers and jobbers who receive and store goods awaiting orders from other States. This, because he thinks the ultimate burden in such case will fall on the consumers in other States. However, it is recognized that the Supreme Court has not made such a distinction

yet and, as an inferior tribunal herein, we think it more seemly to endeavor to follow the higher authority than to pioneer.

Defendant assigns error upon the action of the chancellor in taxing it with cost of the actual inspection of all its products stored at Memphis. We think there was no error in this, regardless of whether the products had left the channels of interstate commerce or not. Pure Oil Co. v. Minnesota, 248 U. S. 158.

It is to be doubted, however, whether this question is properly before the Court. The complainant prayed a special appeal from only so much of the chancellor's decree as taxed it with part of the costs and as held it liable "for any portion of the tax sued for." It was fully recognized by defendant all through the case that sections 6809 et seq. of the Code levy an imposition which includes both a tax and an inspection fee. The appeal appears to be limited to the tax.

The only evidence with reference to the amount of the inspection fee is that 1/25 of the imposition of sections 6809 et seq. of the Code was the actual cost of inspection. There is nothing to indicate that an inspection fee in this amount was excessive. We find no reason to question the chancellor's finding that inspection was made of such part of the products as he charged with the cost thereof.

As for the discrimination complained of between the excise tax on the storage of kerosene and the excise tax on the storage of gasoline, it is sufficient to say that Section 28 of Article 2 of the Tennessee Constitution authorizes the Legislature to tax privileges "in such manner as they may from time to time direct." We do not understand that classification for taxation is forbidden by the Fourteenth Amendment to the Federal Constitution. Storage of gasoline and storage of kerosene are different privileges.

Apart from the foregoing, defendant has no standing to question the constitutionality of section 13 of chapter 130 of the Acts of 1933. It stores in Tennessee three or four times as much gasoline as kerosene. Instead, therefore, of being adversely affected by any discrimination in the Act of 1933, it is a beneficiary thereof.

The decree of the chancellor is affirmed. Defendant will pay one-third of all the costs of this Court and two-thirds of the costs will be taxed to the State.

Justice DeHaven and Special Justice Francher dissent for reasons stated by them in separate opinions filed.

(Signed) GRAFTON GREEN,
Chief Justice.

Note: The above is a true copy of a certified copy of the foregoing opinion.

EXHIBIT E.

Davidson Equity.

STATE, EX REL. MCCANLESS, ETC., ET AL.,

v.

STANDARD OIL COMPANY OF LOUISIANA.

Concurring Opinion.

I concur in the opinion of the Chief Justice, and I add that my reading of the opinion in Carson Petroleum Co. *v.* Vial, relied on for the Oil Company, impresses me that, while the conclusion reached by the majority in that case was that, on the facts of that case, the oil was not subject to local taxation, the opinion of Chief Justice Taft tends to support the contrary result reached in the instant case, on different facts. In a number of material respects, the facts of the Petroleum case, as set forth in that opinion, definitely distinguish that case from the instant case.

1. In that case it is significant that no oil was sold, assembled, or in any way handled at St. Rose except that which was exclusively for export. That point was thus definitely associated with export.

2. The oil temporarily stored at St. Rose was of a grade of gasoline exclusively used for export and in foreign countries, and not used in this country. This bears quite definnitely on the elements of intention and of continuity.

3. Orders were always on hand in excess of the quantity at St. Rose for export shipment, such orders having been already received from the foreign buyers. In other words, it came to St. Rose definitely earmarked by previous sales for shipment interstate.

4. The oil, having been received at St. Rose, was there loaded aboard ships chartered by the foreign buyers, it thus being delivered at that point.

There are other features of fact which tend to support the conclusion reached by the Court in that case on its particular facts, but distinguish it from the instant case.

It seems to me that the instant case comes directly within the "entrepot" definition, approved by Chief Justice Taft, which had been adopted by Mr. Justice Bradley in Coe *v.* Errol, 116 U. S. 517, in which the distinction was clearly drawn between logs which were subject to local taxation and those not subject to such taxation. We have presented here, on the facts, the very difficulty, referred to by Chief Justice Taft, which arises when "the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination."

(Signed) A. W. CHAMBLISS,
Associate Justice.

Note: The above is a true copy of a certified copy of the foregoing opinion.

EXHIBIT F.

Davidson Equity.

STATE OF TENNESSEE, EX REL. GEORGE F. McCANLESS, ETC.

v.

STANDARD OIL COMPANY OF LOUISIANA.

Opinion.

The State of Tennessee is here seeking to recover of defendant inspection fees aggregating $317,366.03 for the period from October 1, 1936, to September 30, 1939, upon

export gasoline, tractor fuel and kerosene alleged to have been "imported into, and/or stored in Tennessee."

Section 1140 of the Code as amended, is as follows:

"Gasoline or distillate not previously the subject of an original sale in this state, stored in this state for export to points outside the state, shall not be included in the measure of the tax liability on any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank"; Provided that a bond is executed by the distributor or dealer that in the opinion of the commissioner of finance and taxation adequately protects the state against loss of tax in case said gasoline or distillate is not subsequently exported outside the state; provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of the tax liability of the distributor or dealer so storing such gasoline or distillate."

The contention of the State is that Code 1140 exempts gasoline or distillate from the special privilege tax of seven cents per gallon imposed by the statute of the State (Code 1128 and chapter 118, Public Acts 1933) but does not exempt such gasoline or distillate from the inspection fees of 4/10 of 1 cent a gallon, or 20¢ per barrel, provided for by section 6809 et seq. of the Code.

Section 6817 of the Code, as amended by chapter 48, Public Acts 1939, is as follows:

"All benzol, gasoline, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha and/or any other volative substance, reflecting a gravity of sixteen degrees or above on the Baume scale, produced from petroleum, natural gas, oil shales or coal, by whatever trade name known and/or substitutes therefor, sold or used and/or stored in this state, separately or in combination for any purpose whatever, by any user and/or storer, including all subordinate governmental bodies, whether manufactured in this state or not, shall be inspected, under the general supervision of the inspector at large, before being sold or offered for sale or used and/or stored in this state."

Under section 6817, the substances enumerated are required to be inspected when "sold or used and/or stored in this state * * * by any user or storer."

The record discloses that defendant brought in its own barges from its refinery at Baton Rouge, Louisiana, up the Mississippi River to Memphis, Tennessee, the amount of gasoline, tractor fuel and kerosene shown by the stipulation filed in the case, and upon the arrival of such products at Memphis by barge they were stored in separate tanks, each marked "export tank," in strict compliance with the requirements of Code 1140, and were shipped to other states, either by railroad tank car or barge, within less than sixty days. None of these products, so stored, were sold, used or distributed for use in Tennessee.

The chancellor found that the gasoline and tractor fuel involved was not subject to any tax liability, except that part of the gasoline (16,211,571 gallons) which was inspected. He found the actual cost of inspection was 1/25 of the inspection fee, or $2,593.85, for which he rendered judgment against defendant. He further found that the kerosene (10,159,603 gallons) involved in the suit was subject to the inspection fees sued for, less the actual cost of inspection where no inspection was made (2,422,931 gallons), amounting to $387.67, and gave judgment in favor of the State for $40,250.74 due on the kerosene involved.

From the decree of the chancellor awarding judgment against it for the total sum of $42,844.60, defendant has appealed to this court and assigned errors. The State appealed and assigned errors in so far as the decree of the chancellor denied it a full recovery of the inspection fees sued for.

Without undertaking to consider the assignments of error seriatim, but going directly to the controlling questions raised, we find as follows:

(1) Code 1140 does not exempt gasoline and distillate stored for sixty days or less, in compliance with the regulations set forth therein, from the actual cost of inspection. However, the inspection fee is in chief an excise tax to a limited extent only an inspection charge. State *v.* N. C. & St. L. Ry., 176 Tenn., —, 137 S. W. (2d) 297; State ex rel.

v. Jackson, 172 Tenn. 119, 110 S. W. (2d) 323. To the extent that the inspection fee is a revenue measure, it is excluded from "the measure of tax liability," under Code 1140. The gasoline stored in the manner required by Code 1140 was a proper subject for inspection. This court said in State *v.* Reed Oil Company, 176 Tenn., —, 137 S. D. (2d), 292:

"Touching inflammable products, the State may in the exercise of the police power inspect and collect fees upon such products as are within the State, as a means of safety even though moving in interstate commerce, but where the Act is strictly a police regulation, the inspection fees cannot exceed the reasonable cost of inspection. Pure Oil Co. *v.* Minnesota, 248 U. S., 158, 39 S. Ct., 35, 63 L. Ed., 180. After such products have come to rest in the State and have ceased to be interstate commerce, the State may impose inspection fees in substantial excess of the cost of inspection as a means of providing general revenue for the State. Texas Co. *v.* Brown, 258 U. S., 466, 42 S. Ct., 375, 66 L. Ed. 721; Standard Oil Co. *v.* Graves, 249 U. S. 389, 39 S. Ct., 320, 63 L. Ed. 662; Askren *v.* Continental Oil Co., 252 U. S., 444, 40 S. Ct., 355, 64 L. Ed. 657."

My conclusion is that the gasoline and tractor fuel stored by defendant in accordance with the requirements of Code 1140 was the proper subject of inspection, and to the extent such products were inspected defendant is liable to the State for the actual cost of such inspection, which was found by the chancellor to be $2,593.85.

(2) As to the kerosene involved in the suit, it is conceded that it does not fall within the definition of gasoline or distillate and, hence, does not fall within the provisions of Code 1140. The chancellor decreed as follows:

"That the kerosene involved in the suit (10,159,603 gallons) is subject to the inspection fees sued for, but there can not be included in these inspection fees the actual cost of inspection where no inspection was made, (2,422,931 gallons). The actual cost of inspection where no inspection was made amounts to $387.67."

If the kerosene was moving in interstate commerce it was not subject to the whole of the inspection fees of 4/10 of 1¢ per gallon, because to the extent that the inspection fee exceeds the actual cost of inspection it is a revenue measure. The question, then, is—was this kerosene moving in interstate commerce?

The petroleum products involved in this cause, it is shown by the record, were transported from Baton Rouge, Louisiana, to Memphis, Tennessee, and there placed in tanks, each marked "export tank", and thence transshipped to destinations located in other states. These products, from a time preceding their introduction into Tennessee and continuously thereafter, were never intended for sale or distribution in Tennessee, and were never received in Tennessee for any purpose other than their transportation to other states. These products were shipped from the river tankage at Memphis, Tennessee, to other states without delay greater than for their orderly and economical transshipment.

It is argued for the State that the final test of taxable situs is whether the journey is interrupted for the business purposes and profit of the shipper. Reliance is placed on the following cases: General Oil Co. *v.* Crain, 209 U. S., 211, 52 L. Ed., 754; Atlantic Coast Line R. Co., *v.* Standard Oil Co., 275 U. S., 257, 72 L. Ed., 270; Susquehanna Coal Co. *v.* South Amboy, 288 U. S. 665, 57 L. Ed., 1015; Bacon *v.* Illinois, 277 U. S. 504, 57 L. Ed., 615; Gulf Refining Co., of La. *v.* Phillips, 1 Fed. (2d) 967 (Certiorari denied) 273 U. S. 697, 71 L. Ed., 845.

The facts of the above cases were materially different from the instant case, among others in the following vital and determinative facts. In some of the above cases the places where the shipments were stored were places operated and maintained as sales depots. In other of the cases the goods were stored awaiting future sales and were not intended to be shipped from the storage points until sold, or the storage points were maintained for the purpose of keeping on hand large reserve stocks in order to meet the demands of customers. In other of the cases the storage points were used for business purposes not related to mere delay

in making arrangements for the continuance of the interstate journey originally planned and carried through.

The State leans heavily on the case of General Oil Co. *v.* Crain, supra. In Carson Petroleum Co. *v.* Vial, 279 U. S., 95, 73 L. ed., 626, the facts in the Crain case are discussed, and the court said:

"The court was divided, and there was very vigorous dissent. The case has caused discussion and it must be admitted that it is a close one and might easily have been decided the other way. The result was probably affected by the impression created by the original situation and the somewhat artificial rearrangement of tanks in a large entrepot for redistribution of oil to avoid previous taxability."

And the court added:

"There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through."

The defendant insists that the Crain case has been confined in scope by subsequent decisions of the Supreme Court of the United States, and as thus confined is not applicable here. The following cases are relied on: Western Oil Refining Co. *v.* Lipscomb, 244 U. S. 346, 61 L. ed., 1181; Eureka Pipe Line Co. *v.* Hallanan, 257 U. S. 265, 66 L. ed., 227; United Fuel Gas Co. *v.* Hallanan, 257 U. S. 277, 66 L. ed., 235; B. & O. S. W. R. R. Co. *v.* Settle, 260 U. S. 166, 67 L. ed. 189; Carson Petroleum Co. *v.* Vial, 279 U. S. 95, 73 L. ed. 626; United States *v.* Erie R. R. Co., 280 U. S. 98, 74 L. ed. 187; W. J. Lake & Co. *v.* King County, 101 Pac. (2d) 357.

The intention of defendant to ship the products in question to other states than Tennessee is not questioned. This intention as it was carried out determined the essential nature of the movement. Defendant's witness, Rathbone, was asked when the petroleum products arrived at Memphis, how it is determined what part is to go into the export tanks and what part in the domestic tanks. He replied:

"That determination is made by our salesmen out in the field, estimating the orders they will get from the various customers in a given period of time. Those estimates we think are quite correct and in fact the records bear out the statement they are quite accurate and they are checked at various intervals and forwarded to the Memphis office and then forwarded by the Memphis office to the refinery. That applies to shipments made from Baton Rouge. *For shipments made out of Memphis it is not made at Baton Rouge, but at Memphis and given to the Master of the boat before he starts to unload.*" (Italics ours.)

Asked if the tanks were kept "as full as you can keep them?" Rathbone replied: "No they are simply kept at a minimum inventory, consistent with meeting our schedules."

A large quantity of the gasoline, tractor fuel and kerosene is delivered to bulk stations of defendant located in Arkansas and Mississippi, which belong to defendant and which do not make any orders; but defendant receives daily or weekly reports from such bulk stations and is thus informed of the amount of gasoline, tractor fuel and kerosene which is on hand at each bulk station and additional shipments are made from the export tanks at Memphis to keep the bulk tanks filled and take care of the trade in that particular area. Rathbone says that the export tanks in which their products are placed, are used for no other purpose than to effect the change from lower Mississippi River transportation to other forms of transportation (river and rail).

The quantity of petroleum products to go into the export tanks was known to defendant before the barges were unloaded at Memphis. The trip from Baton Rouge to Memphis was not completed until the barges were unloaded. See Texas Co. *v.* Brown, 258 U. S. 466; State, ex rel. *v.* City of Jackson, 172 Tenn., 119, 122.

It is contended for the State that in order for continuity of transit to have been preserved, the ultimate destination of specific quantities of the products involved should have been arranged in advance of their unloading at Memphis into the export tanks. In Carson Petroleum Co. *v.* Vial, 279 U. S. 95, 73 L. ed. 626, the facts, briefly stated, were that a subsidiary of Carson Petroleum Company owned and

operated at St. Rose, near New Orleans, a system of tanks and pumping equipment for receiving the contents of railroad tank cars into tanks and afterwards loading it into ships. The oil was brought from refineries in other states than Louisiana, and shipped in railroad tank cars to St. Rose, where it was pumped into these tanks and held until the arrival of a ship or until the quantity on hand was sufficient to make up a cargo. The court, following the case of Texas & N. O. R. Co. *v.* Sabine Tram Co., 277 U. S. 111, 57 L. ed., 442, held that the absence of a definite foreign destination did not alter the character of the shipments.

Defendant, in the instant case, had the unquestioned intention, prior to shipment from Baton Rouge, that the petroleum products (in the quantity as to which the Master of the boat was advised before unloading) stored in the export tanks, were to be transshipped to Arkansas and Mississippi. The record does not reflect the slightest doubt on the bona fide of this intention, which was in all cases carried out. There was no period of deliberation as to whether the products would or would not be exported from Tennessee. The products were held no longer than was necessary for the convenience of transportation, taking into consideration all of the surrounding circumstances.

The chancellor took the view that the Crain case would be controlling as to the gasoline involved, but for the fact that it was stored in separate tanks, under statutory provisions found in Code 1140. As to the kerosene involved, not being covered by Code 1140, the chancellor took the view that it was governed by the Crain case.

What constituted interstate commerce is not a technical legal conception, but a practical matter to be determined upon a broad consideration of the substance of the whole transaction. Until States *v.* Erie Railroad Co., 280 U. S. 98, 74 L. ed., 187; Dozier *v.* Alabama, 218 U. S. 124, 54 L. ed., 965, 28 L. R. A. (N. S.) 264; Swift & Company *v.* United States, 196 U. S., 375, 49 L. ed., 518.

The cases relied on in support of the majority opinion present facts materially different from the facts of the instant case, and, hence, are neither applicable nor controlling. As said in Atlantic Coast Line R. Company *v.* Standard Oil Company, 275 U. S. 257, 72 L. ed., 280,

"the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."

Without going into an analysis of the cases, my conclusion is that under the uncontradicted facts the products here in question were moving in interstate commerce and, therefore, not subject to the inspection tax sued for, except to the extent of the reasonable cost of inspection. A state may, in the exercise of its police power, subject products moving in interstate commerce to reasonable inspection and may collect the reasonable cost of such inspection. Railroad Company *v.* Husen, 95 U. S. 465, 24 L. ed., 527; Minnesota *v.* Barber, 136 U. S. 313, 34 L. ed., 455; Brimmer *v.* Rebman, 138 U. S. 78, 34 L. ed., 862; Hale *v.* Bimco Trading Company, 306 U. S., 375, 83 L. Ed., 771.

For the reasons herein stated, I concur in the majority opinion with respect to the gasoline, but dissent from the holding with respect to the kerosene.

DEHAVEN,
Judge.

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE.

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of State of Tenn. ex rel. McCanless, Com'r. against Standard Oil Co. of La., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 8th day of March, 1941.

DAVID S. LANSDEN,
Clerk.

[SEAL.]

EXHIBIT G.

Davidson Equity.

STATE OF TENNESSEE, EX REL. GEO F. McCANLESS,

v.

STANDARD OIL COMPANY OF LOUISIANA.

Concurring Opinion.

In this suit, I concur in the opinion of Justice DeHaven.

I will not re-state the facts, which are well stated in the opinion. For a consideration of the law governing the case, I am content to refer to the same opinion, also the opinion written by Chief Justice Green in the Texas case and the opinion written by me in the Gulf Refining case.

The fact of shipment is the same as the shipments of gasoline. It was all shipped in the same manner, by barges to Memphis, and there stored in tanks marked Export Tanks. It was not definitely known in advance the exact amount that would be pumped into local tanks or in export tanks. It was known definitely that an approximate amount, to be determined by the needs of the trade, would be placed in the export tanks from the barges. There was then a definite purpose formed that an approximate amount of the shipment was enroute for export. This approximate amount of kerosene was therefore from beginning started on its way as an interstate shipment. The exact amount so destined was determined before it came to rest at any place. Thenceforth, while still on the journey, it was definitely determined in advance of any change in movement to be placed in the export tank.

Had there been two barges, one for intrastate and one for interstate shipment, no difficulty would be presented. The State has expressly consented that a stop in the tank of sixty days to meet the exigencies of further shipment is a reasonable time as to gasoline. I think it may as well be determined that the sixty days would be equally reasonable as to kerosene. It is not a stop for future determination

whether it is an interstate shipment. It is simply a reasonable storage for purposes of economy in shipment.

I can see no room for saying a given shipment of gasoline is interstate in character and a like shipment of kerosene is not. The only difference is that for some reason kerosene was not mentioned in the Statute, Section 1140 of the Code as amended by Ch. 130, Acts 1933.

I do not place my opinion in the Gulf case upon the Statute alone but upon the entire fact of shipment, giving weight to the legislative recognition that sixty days time under the circumstances is not an unreasonable period for the further movement.

I concede there is room for a different conclusion. I recognize the good policy suggested by Judge Green that it is "more seemly to endeavor to follow the higher authority than to pioneer." Still, difficult as the problem is, and however much Courts may differ, I feel impelled to the conclusion that this good faith movement has all the essential elements of interstate commerce.

(Signed) FRANK T. FANCHER,
Special Judge.

Note: The above is a true copy of a certified copy of the foregoing opinion.

EXHIBIT H.

Davidson Equity.

THE TEXAS COMPANY,

v.

GEORGE F. MCCANLESS, Commissioner, Etc.

Opinion.

This case involves a controversy between the complainant and the Commissioner of Finance and Taxation with reference to the liability of the former for the so-called inspection fee exacted with respect to gasoline and like products by Code sections 6809 et seq., more particularly by sections

6817, 6818, and 6821. The facts are stipulated. The chancellor decided the major portion of the controversy in favor of the complainant. Both parties assigned errors.

As a part of its business the complainant ships into this state from other States quantities of gasoline, which gasoline is stored in tanks for a period of less than sixty days, and then shipped out of the State to consumers there located. None of the gasoline involved in this litigation was sold or used in Tennessee.

Code section 6817 and following sections exact a so-called inspection fee of 20¢ a barrel or less quantity upon gasoline and kindred substances enumerated, sold or used, and/or stored in this State. The nature of this exaction has been considered by the Court in a number of decisions. The amount of the exaction largely exceeds the cost of inspection. In the recent case of State v. Nashville C. & St. L. Ry., 137 S. W. (2d) 297, we said:

"This court has long since recognized that the exaction here in question is in chief an excise tax and to a limited extent only an inspection charge. State of Tennessee v. Reed Oil Co., 137 S. W. (2d) 292; State ex rel. v. Jackson, 172 Tenn. 119. This is to say the statute assesses an excise tax on the sale, use or storage of these products measured by the number of barrels sold, used or stored. This as well as some charge for inspection."

Section 1126 et seq. of the Code levy a gasoline tax, an excise or privilege tax, on dealers in gasoline or distillates thereof equal to five cents for each gallon of gasoline or distillate sold or distributed by such dealer in the State during each year. This tax has been increased by subsequent legislation and made to apply to those storing gasoline or distillates thereof. Chapter 130 of the Acts of 1933.

Code section 1140, dealing with the gasoline tax, provided "None of the provisions of this statute shall apply to the sales of gasoline or distillate when sold for, and exported out of the state."

A number of the Code sections constituting the gasoline tax laws were amended by this chapter 130 of the Acts of 1933. Among other things, section 13 of the Act of 1933 provides as follows:

"That Section 1140 be amended by striking out said Section and substituting in lieu thereof the following:

" 'Gasoline or distillate not previously the subject of an original sale in this State, stored in this State for export to points outside the State, shall not be included in the measure of the tax liability of any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank";

"Provided that a bond is executed by the distributor or dealer that in the opinion of the Commissioner of Finance and Taxation adequately protects the State against loss of tax in case said gasoline or distillate is not subsequently exported outside the State;

"Provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of the tax liability of the distributor or dealer so storing such gasoline or distillate."

The exaction which the complainant is resisting, which it paid under protest and here seeks to recover, is so much of the so-called inspection fee as the Commissioner charged against gasoline kept and disposed of by the complainant in strict conformity with the terms of section 13 of the Act of 1933 for a period of less than sixty days.

The complainant takes the position that the exclusion of gasoline so handled in section 13 aforesaid from "the measure of the tax liability of any distributor or dealer" relieves it of liability from the so-called inspection fee, or at least so much of such inspection fee as levied by way of a tax and not by way of inspection. The stipulation shows that 1/25 of this exaction covered the cost of inspection.

The Commissioner takes the position that section 13 of the Act of 1933 only relieves complainant of liability for the gasoline tax on gasoline handled in conformity with the terms of that section. That this exemption has no relation to the so-called inspection fee on gasoline exacted by Code sections 6809 et seq.

The complainant insists that all these Acts are to be construed in pari materia. The Commissioner challenges this

and urges the familiar rule that tax exemption statutes are strictly construed.

There has been a great argument in the case as to whether the gasoline over which this controversy is waged ever departed from the flow of interstate commerce—whether it ever became subject to the taxing power of the State. We do not find it necessary to consider this question, since we think the gasoline was by section 13 of the Act of 1933 relieved of the burden of sections 6809 et seq. in so far as the latter sections imposed a tax.

It is not necessary, as has been suggested, to regard gasoline handled in accordance with the terms of section 13 of the Act of 1933 as remaining in the channels of interstate commerce in order to sustain the discrimination made between gasoline stored in a tank marked "Export Tank" and gasoline stored in a tank not so marked.

The taxing power of the State is limited to its jurisdiction. When a tax is measured with respect to property, as is the gasoline tax, the property must be located within the jurisdiction of the State. Street Railroad Company v. Morrow, 87 Tenn. 406; State Tax on Foreign-held Bonds, 15 Wall. 319.

"To authorize an assessment of personal property in any other State or county than the one in which the owner resides, it must appear that the property is being to some extent kept and maintained in such State or county, and is not there casually, nor in transition, nor temporarily, in the ordinary course of business or commerce." Carhart *v.* Jones (Chy. App.) 37 S. W. 565. To like effect see Cooley on Taxation (Fourth Edition), sec. 452 et seq.; 26 R. C. L. 130; 26 R. C. L. 276.

The authorities recognize that *permanent* and *temporary* are relative terms and that difficulty arises in determining when a stop is temporary or permanent. The exemption provided by section 13 of the Act of 1933 only applies when the gasoline is not stored for a longer period than sixty days. Without intimating that it might not have made the period shorter, we think it was within the competency of the Legislature to treat a halt in the flow of this gasoline for sixty days as a temporary stop and deal with it ac-

cordingly. This, irrespective of whether the gasoline had gone from under the protection of the Commerce Clause of the Constitution, or not.

Gasoline not stored in tanks marked "Export Tanks" may remain in such tanks indefinitely. There is, therefore, a valid reason for the distinction made by the statute.

Sections 1127 and 1128 of the Code levying the gasoline tax characterized it as "a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this State." There can be no such thing as an additional tax unless there exists another tax. Therefore in the enactment of the provision carried into the Code at sections 1126 et seq., the Legislature must have had in mind that the tax liability of those in the gasoline business would not be measured by this statute alone.

Section 13 of Chapter 130 of the Acts of 1933, by way of amendment, adds a proviso to the statute levying the gasoline tax. The form of this proviso is somewhat unusual. It does not, as provisos usually do, except the subject with which it deals from the scope of the particular Act to which it is added. Had it been intended to except transient gasoline from the embrace of the gasoline tax only, the proviso would doubtless have read, in substance, that nothing in this Act, or nothing in the sections of the Code amended, shall apply to transient gasoline. But the proviso was much broader and excepted transient gasoline from "the measure of the tax liability" of those in the gasoline business. We have just seen what the Legislature must have considered the tax liability to be and the measure of a thing is the "prescribed limit," "not to be exceeded." Webster's New International Dictionary.

It is contended by the State that chapter 130 of the Act of 1933 can not be construed to amend or affect sections 6809 et seq. of the Code because by its caption the Act is entitled one to amend "sections 1126, 1127, etc., etc.," specifically referring to numbered Code sections other than, and not including, sections 6809 et seq.

We assume the State relies on the rule contained in Hays *v.* Federal Chemical Co., 151 Tenn. 169, that when the title of an amendatory Act sets out the proposed amendments,

such Act can include no amendments to the original Act other than those indicated in the caption; that accordingly sections 6809 et seq. of the Code, not being among the Code sections named in the caption, can not be affected by the Act.

Neither this rule nor section 17 of Article 2 of the Constitution upon which the rule is based relates to amendments by implication. It may be that under the caption of an amendatory Act purporting to amend specified sections of one particular statute other sections of that statute could not be amended. Such an argument would be plausible. A different situation is presented, however, when an amendatory Act undertakes to amend sections of the Code. Repeals and amendments by implication were recognized as a matter of necessity. Home Ins. Co. *v.* Taxing District, 72 Tenn. (4 Lea) 644. It would be utterly impractical, if not impossible, to require of a legislative Act that it contain apt reference to every law which the Act might possibly touch. The Code of 1932 contains 12278 sections. Legislation would be greatly embarrassed by a rule that required a statute amending a particular section of the Code to refer to every other section of the Code which by implication the statute might reach.

We accordingly conclude that the chancellor properly held complainant entitled to recover so much of the exaction collected from it under sections 6809 et seq. of the Code as represented its tax liability under that statute. We further agree with the chancellor that complainant is not entitled to recover so much of this exaction as represents the actual cost of inspecting the gasoline which is stipulated to have been 1/25 of the prescribed fee. Section 13 of the Act of 1933 only exempts one in the gasoline business from further tax liability, not from a legitimate fee assessed for inspection of the product.

Affirmed.

(Signed) GRAFTON GREEN,
Chief Justice.

Note: The above is a true copy of a certified copy of the foregoing opinion.

EXHIBIT I.

Davidson Equity.

STATE OF TENNESSEE EX REL. GEO. F. McCANLESS ET AL.

v.

STANDARD OIL COMPANY OF LOUISIANA.

On Petition to Rehear.

A petition to rehear is filed herein, to some extent re-arguing questions discussed in the previous opinions of the court, but chiefly complaining, because it is said the Court disregarded settled administrative construction of the statutes involved, heedless of the rule announced in New England Mutual Life Insurance Co. *v.* Reece, 169 Tenn. 84.

This contention would be quite forceful if confined alone to the burdens placed upon gasoline. An examination, however, of the opinions of the Attorney General relied on, those of January 20, 1931, and June 2, 1933, rather plainly shows, we think, that the official had in mind volatile substances and gasoline. Certainly the whole body of the opinion of June 2, 1933, shows that it is dealing with gasoline.

We think it cannot be said that there was any settled administrative construction of the statutes involved, prior to the enactment of the Code of 1932, so as to call for the application of the rule that these statutes were re-enacted as construed.

With reference to the alleged unconstitutional discrimination, we can only repeat that the defendant here is not prejudiced by this discrimination for reasons stated in the opinion and has no ground of complaint.

The majority of the court find no reason to depart from the conclusion previously announced and the petition to rehear is denied.

GREEN, *C. J.* (S.)

EXHIBIT J.

Davidson Equity.

STATE OF TENNESSEE, EX REL. GEORGE F. McCANLESS ET AL.

v.

STANDARD OIL COMPANY OF LOUISIANA.

On Petition to Rehear.

A second petition to rehear has been filed herein. Although no permission was obtained from the court for such practice, we have carefully considered the petition.

The particular complaint in this petition is the statement of the court that the opinions of the Attorney General and the departmental ruling involved referred to gasoline and volatile substances, not including kerosene.

It is not necessary to continue discussion of this point. These rulings of the Attorney General and of the Department of Finance had not persisted for any great length of time. If they were incorrect, there seems to be no reason for adhering to them. This on the supposition that they were intended to include kerosene.

Comparatively recent rulings of this nature do not have any especial weight unless parties concerned have acted on such rulings to their prejudice. A re-examination of the record shows that the defendant herein did not erect kerosene export tanks at Memphis on the faith of any opinion of the Attorney General or of any departmental ruling.

In the testimony of Mr. Rathbone, president of defendant company, the following appears:

"Q. And was it after the erection of those additional tanks on the property which the company acquired, that the regular traffic to Arkansas through the Memphis terminal commenced?

A. Yes, sir, that is correct.

Q. Now you mentioned the erection of some tanks at that time. Were some other tanks erected at the Memphis terminal?

A. Yes, sir, in 1933 and 1934. I cannot be specific as to dates, but I would say within those two years we erected four additional tanks at Memphis.

Q. Was it subsequent to and for the purpose of complying with the Act of the General Assembly of the State of Tennessee for 1933, which revised Section 1140 of the Code of Tennessee?

A. Very definitely. The Manager at Memphis had a good deal of difficulty in getting the appropriation for it.

Q. You mentioned four tanks, what was the necessity for only four of those additional tanks? Was it for four different products?

A. At that time, as I just testified, we were advised by our legal department, it was necessary for us to have separate tanks for all the shipments made from the Riverside terminal to other States. In other words, export shipments and those tanks were erected to comply with the requirements of that Act."

The foregoing shows very distinctly that defendant company relied on the Act of 1933, amending section 1140 of the Code, and the construction of that Act by its legal department when it went to the expense of building separate export tanks at Memphis. The State, of course, is not responsible for such action.

The second petition to rehear is denied.

GREEN, *C. J.*

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, David S. Lansden, Clerk of said Court do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at its December term, 1940, of State ex rel., McCanless, et al., *v.* Standard Oil Co. of La., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Capitol at Nashville, on this, the 28th day of June, 1941.

(Signed) DAVID S. LANSDEN,
Clerk.